**UNITED STATES OF AMERICA**
**DEPARTMENT OF TRANSPORTATION**
**OFFICE OF THE SECRETARY**
**WASHINGTON, D.C.**

Served January 10, 1997

Issued by the Department of Transportation
on the 8th day of January, 1997

**INTERNATIONAL AIR TRANSPORT ASSOCIATION:**

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION

**Docket OST-95-232**

**AIR TRANSPORT ASSOCIATION OF AMERICA:**

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION

**Docket OST-96-1607**

## ORDER ON RECONSIDERATION

**Summary:**

By this order we modify our Order 96-11-6 which approved, *pendente lite,* the IIA, MIA and IPA Agreements [1] filed by IATA and ATA, subject to conditions, to the extent of removing, *pendente lite,* the first condition that: the MIA's optional application of the law of the domicile provision would be required for operations to, from, or with a connection or stopping place in the United States. In addition, we modify the previous condition (4) applicable to the IPA Agreement to the extent of temporarily permitting the IPA Agreement, as well as the MIA Agreement, to be

[1] These acronyms are utilized by IATA and ATA, to refer to the three Agreements formally entitled, respectively: "The IATA Intercarrier Agreement"; "The Agreement on Measures to Implement the IATA Intercarrier Agreement"; and the ATA Agreement, "Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs".

substituted for the 1966 Montreal Interim Agreement. Moreover, we will accept, as discussed below , tariffs implementing the MIA Agreement and the IPA Agreement. We will further grant discussion authority and antitrust immunity to ATA, IATA, the Victims Families Associations and all other persons and organizations participating in discussions to be held between now and June 30, 1998, to address the remaining concerns of the Department. We will continue to defer action with respect to other agreement and authority conditions proposed in our Order to Show Cause 96-10-7, issued October 3, 1996.

**Background:**

By applications filed July 31, 1996, the International Air Transport Association (IATA), and the Air Transport Association of America (ATA), requested approval of, and grant of antitrust immunity with respect to, three agreements. These agreements, in increasing details of implementation, provide for waiver in their entirety, by carriers parties to those agreements, of the limits of liability applicable under the Warsaw Convention [2] to passengers killed or injured in international aircraft accidents. [3] The IATA and ATA Agreements are proposed for application worldwide. The Agreements were negotiated by carriers under discussion authority granted to IATA and ATA by DOT Orders setting forth guidelines for such Agreements. [4]

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, with additional Protocol, concluded at Warsaw, October 12, 1929, entered into force for the United States, October 29, 1934, 49 Stat. 3000; TS 876; 2 Bevans 983; 137 LNTS 11. In principal effect the Warsaw Convention limits the liability of carriers for passengers killed or injured in international aircraft accidents to $10,000. Under a 1966 intercarrier agreement, carriers operating to and from the United States waived that limit up to $75,000 for journeys to and from the United States, and waived the defense, under Article 20(1) of the Convention, of carrier proof of non-negligence. Pursuant to 14 CFR 203 all carriers operating to and from the United States are required to be, and are deemed to be, parties to the 1966 agreement. Thus, the applicable limit to and from the United States is currently $75,000.

[3] IATA and ATA, respectively, also requested an exemption from various regulations and orders, *etc.* of the Department that require adherence to the 1966 intercarrier agreement waiving the Warsaw limits to $75,000 to and from the United States, and that the instant agreements may be substituted for the 1966 intercarrier agreement in those regulations and orders, *etc*.

[4] Discussion authority was granted to IATA, ATA, and participating carriers, upon the request of IATA, by Order 95-2-44, and extended by

Both the MIA and the IPA Agreements provide in principal effect that:

> "1. {CARRIER} shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.
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> "2. {CARRIER} shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs." [5]

The ATA IPA Agreement differs from the IATA MIA Agreement only in that (1) there is no option on specific routes to waive the defense of carrier proof of non-negligence to amounts less than 100,000 SDRs; (2) the application of the law of the domicile is not optional; [6] (3) it does not include a non-application of the waivers for Social Agencies; (4) it includes a specific notice provision and a provision for withdrawal from the 1966 Montreal Intercarrier Agreement with substitution of the IPA Agreement in all DOT regulations and orders, *etc.* referring to the 1966 Agreement. The IPA Agreement also includes a permissive provision to encourage other carriers to become parties to the IIA, MIA and IPA Agreements. [7]

**The Department's Orders:**

By Order to Show Cause 96-10-7, issued October 3, 1966, we tentatively approved all three Agreements subject to conditions requiring that the waiver of the Warsaw liability limit be on a systemwide basis, and, with respect to application to and from the U.S., subject to several

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Orders 95-7-15, 96-1-25, and 96-3-46. Discussion authority was granted to ATA, IATA and participating carriers, upon the request of ATA, by Order 95-12-14.

[5] The MIA Agreement permits a waiver of the defense up to less than 100,000 SDRs on specific routes, but only if authorized by the Governments concerned with the transportation. It was understood that such waivers for less than 100,000 SDRs would not be authorized for operations to and from the U.S.

[6] Under this provision the carrier agrees that the law of the domicile may be applied. It does not, however, attempt to bind the claimant to this choice of law. (ATA Application, 1st. par., p. 8.)

[7] All three Agreements provide for reservation of defenses, and the right of recourse, contribution and indemnity with respect to third parties.

conditions, and with a request for comments on other possible conditions, proposed to be applicable to the agreements or the authority of U.S. and foreign air carriers to operate to and from the United States.

Following numerous procedural and substantive objections to many of the conditions proposed in our show cause order, and those conditions as to which comment was sought, DOT issued Order 96-11-6 on November 12, 1996, approving all three agreements subject only to conditions on the MIA that (1) the MIA's optional application of the law of the domicile provision would be required for operations to, from, or with a connection or stopping place in the United States; (2) the MIA's optional provision for less than 100,000 SDRs' strict liability on particular routes could not apply for any operations to, from, or with a connection or stopping place in the United States; and (3) the optional inapplicability for social agencies of the MIA's waivers of the limit and Article 20(1) carrier defense of proof of non-negligence shall have no application to U.S. agencies. The IPA agreement was also conditioned to the effect that its provision for withdrawal from the 1966 Montreal Interim Agreement shall not be effective at this time. No conditions were included with respect to the IIA agreement. The order also granted interim exemptions for all carriers adhering to any of the three agreements from applicable DOT regulations and authority conditions only to the extent necessary to implement those agreements in a manner consistent with the order. In addition, tariffs consistent with the IPA Agreement (exclusive of withdrawal from the 1966 Montreal Interim Agreement) would be accepted in substitution for tariffs under DOT's liability rules. Carriers not accepting such tariffs, were exempted from the tariff filing requirements. All other issues raised in Order to Show Cause 96-10-7 were def erred for future consideration.

**IATA Petition for Reconsideration**

On December 20, 1996, IATA filed a petition for reconsideration of Order 96-11-6. [8] IATA requests that DOT approve the MIA Agreement without the condition that the

[8] On November 22, 1966, prior to the expiration of the time for filing a reconsideration petition, IATA filed a motion to extend the time for filing a petition for reconsideration to December 31, 1966. We will grant the motion.

optional provision for carrier submission to the law of the domicile be applied to and from the United States. IATA also seeks reconsideration with respect to acceptance of tariffs conforming to the MIA subject to the remaining conditions ( *i.e.*, those excluding non-applicability from the waivers for U.S. social agencies, and excluding exercise of the option for less than 100,000 SDRs to and from the U.S.). In addition, IATA seeks leave for carriers filing the MIA in that form to have it replace the 1966 Montreal Agreement.

In support of its petition, IATA argues that non-U.S. carriers are committed to maximum practicable uniformity in the implementation of voluntary ameliorations of the Warsaw liability regime and to the development of tariffs which provide a binding and Warsaw-cognizable basis for enhanced passenger protection. IATA notes that the IIA Agreement, providing only for waiver of the Warsaw liability limits in their entirety, "became effective among its signatories as of November 12, 1996," by virtue of its interim DOT approval without conditions, but that non-U.S. carriers which might otherwise adhere to the MIA Agreement, will not accept the condition requiring application of the law of the domicile. It argues that any effort to enhance the provisions of the Agreements by conditions applying the law of the domicile for which there is no consensus among non-U.S. carriers, will only result in fragmentation of the liability waiver provisions to the detriment of the traveling public. It urges that additional reforms be sought through intergovernmental discussions in ICAO. It also urges that the liability waivers be permitted to be implemented through tariffs in order to provide public transparency and certainty on the liability issues, and to permit the Department's mon itoring of approved Agreements.

**Answer to IATA's Petition**[9]

On December 26, an answer to IATA's petition was filed by the Victims Families' Associations. [10] They refer to suggestions contained in their earlier filings in this docket, including that interim approval of the IPA should be in effect only until June 30, 1998; and that antitrust immunity should be extended for carrier discussions of the

[9] By Notice served on December 20, 1996, we granted IATA's motion to shorten the answer period so as to provide that answers were due to be filed by December 24, 1996. An answer in support of the motion, generally supporting IATA's petition, was filed by ATA on December 20, 1996.

[10] We will accept the Victims Families' Associations' answer which was filed late.

open issues in this case. Specifically, the Victims Families' Associations believe that discussions between all involved parties, including themselves, should begin within 90 days and reports made to DOT within 7 days of each meeting.

If ordering paragraph 2(a) of Order 96-11-6 is withdrawn, the law of the passenger's domicile should be included in the discussions. The Families emphasize the importance of that issue, as well as the systemwide application of the liability system, and proper notification to the public of what liability regime is applicable to them.

To that degree, the Families' Associations support reconsideration to allow carriers to file new tariffs under the provisions of Order 96-11-6, to encourage participation in the IPA, and allow discussions on the open issues to begin promptly to replace the interim order with a final order on or before June 30, 1998.

**Decision**

We have decided to grant reconsideration of our order, and upon reconsideration to modify the order to the limited extent set forth below.

IATA represents that there is a large consensus for adherence to the MIA Agreement, but that no consensus among non-U.S. carriers exists for implementation of that agreement if subject to the condition that requires application of the law of the domicile. IATA urges that the public interest will be significantly served by permitting implementation of the MIA agreement, *pendente lite*, and thereby creating a uniform basis for waiver of the Warsaw liability limits in their entirety, with strict liability up to 100,000 SDRs. [11] In the absence of removal of the condition requiring application of the law of the domicile, IATA argues, much less of a consensus could be achieved for progress in these two major respects, and a danger exists of fragmentation of the progress that has been achieved to date.

As we noted in Order 96-11-6, the public interest is clearly served by immediate implementation of the agreements providing for systemwide waiver of the Warsaw liability limits in their entirety, pending resolution of our other

[11] We expect that all U.S. carriers will become parties to and promptly implement the IPA Agreement , which includes the law of the domicile provision .

serious concerns in a timely and considered manner. It was for that reason that we approved, *pendente lite,* the IIA agreement, which provided only for waiver of the limits in their entirety, although it also contemplated, but did not mandate, a waiver of the Warsaw Article 20(1) defense of carrier proof of non-negligence.

IATA now presents us with a large consensus for waiver of the limits in their entirety, and strict liability (waiver of the Article 20(1) defense) up to 100,000 SDRs. While this consensus does not go as far as we had hoped, and does not resolve serious concerns of the Department and the Victims Families' Associations, we agree with IATA that , considering the large consensus that has been achieved, pending further careful consideration of measures to resolve our other concerns, we should approve the MIA Agreement without the requirement for acceptance of application of the law of the domicile. This will consolidate in a uniform manner, and preserve, *pendente lite*, that consensus which has been achieved. We will, therefore, delete the condition applied to the MIA agreement which requires application of the law of the domicile. [12]
Nevertheless, our serious concerns as to the ultimate application of the law of the domicile remain. We will, therefore, adopt the suggestion of the Victims Families ' Associations [13] that discussion authority and antitrust immunity be extended for ATA, or other persons or organizations ,[14] to sponsor further discussions looking toward developing a consensus that will resolve the major concerns of the Department and the Victims Families' Associations through a voluntary consensus of the carriers, and the further implementation of these agreements, as well as the encouragement of other carriers to participate in

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[12] The option to submit to the law of the domicile, at the instance of the claimant will, nevertheless, remain as provided in the MIA Agreement. Thus the MIA Agreement will be approved subject only to the conditions that (1) the MIA's optional provision for less than 100,000 SDRs' strict liability on particular routes could not apply for any operations to, from, or with a connection or stopping place in the United States; and (2) the optional inapplicability for social agencies of the MIA's waivers of the limit and Article 20(1) carrier defense of proof of non-negligence shall have no application to U.S. agencies.

[13] *See also,* the answers of ATA and the Victims Families Associations filed in these proceedings on October 31 and October 30, 1996, respectively ; and ATA's answer in support of IATA's motion to shorten the time period for answers to IATA's petition, filed December 20, 1996.

[14] Other persons or organizations include IATA, all carriers by air, the Victims Families Associations, and a ny other persons or organizations that have an interest in these proceedings.

them. We will grant that authority until June 30, 1998, subject to our normal conditions. We understand that ATA is ready and willing to sponsor these further discussions, and is prepared to begin the process within the next 90 days. We believe that voluntary carrier action would be a most satisfactory means of resolution of the difficult problems remaining , and we strongly encourage the parties to participate in this effort to build upon the existing consensus . It is our intent to monitor the carrier efforts closely, and to review carrier efforts and resolve the outstanding issues not later than June 30, 1998, although we would hope that they may be resolved before then.

IATA also requests that we permit the MIA Agreement, conforming to the revised conditions, to be implemented through tariff filings, and that carriers so adhering to that Agreement be permitted to have it replace the 1966 Montreal Interim Agreement, and be exempted from regulations mandating adherence to the 1966 Agreement. IATA argues that implementation through tariffs provides all parties or litigants with certainty as to the content of the applicable waivers, and will prevent needless litigation over the lack of such clarity.

We have decided to accept tariffs for implementation of the MIA Agreement provided that those tariffs contain only the so called mandatory provisions of the MIA ( *i.e.*, waiver of the limits in their entirety, and strict liability up to 100,000 SDRs--Section I of the MIA Agreement), in the precise language of the MIA. [15] The only optional provision that may be included in those tariffs will be the provision for submission to application of the law of the domicile at the claimant's option. Tariffs accepted by DOT as meeting these requirements may have immediate effectiveness.

Other optional provisions of the MIA may be included in the carriers' conditions of carriage, but shall be applicable for transportation to and from the United States only to the extent specifically authorized by the Department. [16] We will require that all such conditions be filed in the dockets in these proceedings, and clearly specify the extent to which the condition is applicable for transportation to and from the United States (or with respect to inapplicability of the

[15] As provided in Order 96-11-6, we will also accept tariffs conforming to the provisions of the IPA Agreement.

[16] In the context of such DOT consideration, we will also be in a position to determine if any portion of such provisions might more appropriately be included in tariffs, but only to the extent, and in language approved by, the Department.

waiver to Social Agencies, as not being applicable to U.S. Social Agencies). We will similarly permit an implementation of the IIA, which does not include the strict liability provision up to 100,000 SDRs, by conditions of carriage which must be filed in the docket of this proceeding. [17] We will exempt carriers that are parties to the IPA, MIA and IIA from other DOT regulations and authority conditions, including the requirement for filing of tariffs not in conformity with the form of tariffs specified above, only to the extent required for implementation of the agreements in a manner consistent with this order. Tariffs filed under these provisions must expire upon final action in this proceeding, or as otherwise specified by subsequent Department orders in these proceedings.

Finally, we recognize the desirability of substituting these Agreements, with the waiver of the Warsaw liability limits in their entirety, and application of strict liability up to 100,000 SDRs, for the 1966 Montreal interim agreement provisions which waive liability limits only up to $75,000. We will therefore provide, that to the extent that, and only for so long as, a carrier is party to one of the two agreements (the IPA or MIA Agreements) in the manner specified herein, the applicable agreement will be considered to be substituted for the 1966 Montreal Interim Agreement for the purposes of all DOT regulations and authority conditions requiring participation in the 1966 Agreement, [18] and the carriers shall cease to be parties to the 1966 Agreement for such period.

**ACCORDINGLY:**

1. We approve *pendente lite* under 49 U.S.C. 41309, subject to the conditions set forth in paragraph 2, the Intercarrier Agreement on Passenger Liability (IIA), and the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA), filed by IATA and by, and on behalf of, various air carriers and foreign air carriers, and the Agreement on Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs (IPA), filed by ATA and various air carriers and foreign air carriers (prospectively) ;

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[17] As is the case for options under the MIA, the Department can consider at the time of filing whether portions of those conditions might be included as tariffs. Conditions of carriage under the IIA for waiver of the limits in their entirety, and/or a waiver of the Article 20(1) carrier defense of proof on non-negligence up to 100,000 SDRs, shall become effective immediately upon filing of those conditions in the docket , unless the carrier specifies otherwise .

[18] As provided in 14 CFR 221.175, carriers may substitute the IPA or similar ticket notice for that specified in our rules.

2. The approvals granted in paragraph 1, above, are subject to the conditions that:

a. The MIA's optional provision for less than 100,000 SDRs' strict liability on particular routes, will not apply for operations to, from or with a connection or stopping place in the United States.

b. The optional inapplicability, under the MIA, for social agencies of the waivers of the limit and Article 20(1) carrier defense of proof of non-negligence shall have no application to U.S. agencies ;

3. Tariffs may be filed implementing the provisions of the IPA, and the MIA only with respect to section I thereof, or section I thereof together with the option for application of the law of the domicile in section II, paragraph 1, provided those tariffs conform precisely with the language as provided in those agreements. Tariffs accepted by DOT as meeting these requirements may have immediate effectiveness. Tariffs filed pursuant to this paragraph must expire upon any final action of the Department in these proceedings which does not make provision for identical tariffs, or in accordance with any order of the Department entered in these proceedings ;

4. Options under the MIA (except application of the law of the domicile (sec. II(1)), and implementation of the IIA, shall, except as otherwise ordered by the Department, be accomplished by conditions of carriage filed in the dockets of these proceedings. No such MIA options, or conditions other than waiver of the Warsaw liability limits in their entirety under the IIA, and/or waiver of the Warsaw Article 20(1) carrier defense of proof of non-negligence up to 100,000 SDRs under the IIA, shall be effective for transportation to and from the United States, unless specifically authorized by order of the Department in these proceedings ;

5. Carriers implementing the IPA Agreement or the MIA Agreement in accordance with tariffs conforming to ordering paragraph 3 above, will by DOT acceptance of the filing of such tariffs substitute the IPA Agreement or MIA Agreement for the 1966 Montreal Intercarrier Interim Agreement (Agreement 18900) for the purposes of all DOT regulations and conditions on operating authority requiring participation in the 1966 Agreement for so long as they are parties to the IPA or MIA Agreement, under such tariffs, or as otherwise required by the Department, and, for such

period, those carriers shall cease to be parties to the 1966 Agreement ;

6. Pending final action by DOT in these proceedings, or as otherwise ordered by the Department, to the extent not otherwise provided for in ordering paragraphs 3, 4 and 5 above, carriers parties to the IPA, MIA and IIA Agreements, as approved in this order, are exempted from all DOT regulations and authority conditions only to the extent necessary to implement those agreements in the manner contemplated by this order ;

7. We grant immunity under the Antitrust Laws, in accordance with 49 U.S.C. 41308, solely to the extent necessary for the interim implementation of the IIA, MIA and IPA Agreements as provided in this order ;

8. We grant authority under section 41308 of Title 49 of the United States Code to ATA, IATA, the Victims Families Associations, all US and foreign air carriers and carriers by air, or other interested persons or organizations, to hold discussions looking toward a modification of the Agreements or other measures to accomplish the objectives sought by the Department in its Order to Show Cause 96-10-7, and the guidelines set forth in Order 95-2-44, to further provide for implementation of these agreements, and to encourage widespread adherence to the IPA, MIA or IIA as approved by the Department. Such discussions may be sponsored by ATA, or other persons or organizations. We grant all persons, organizations or carriers participating in such discussions exemptions from the operation of the antitrust laws under section 41309 of Title 49 of the United States Code. The Department's discussion authority is subject to the conditions set forth in ordering paragraph 9 below. The discussion authority granted by this paragraph shall expire on June 30, 1998 ;

9. The Department's approval of discussion authority is subject to the following conditions:

(a) Advance notice of any meeting shall be given to the Air Transport Association of America, the International Air Transport Association, the Victims' Families Associations and the U.S. Departments of Transportation, State and Justice;

(b) Representatives of the entities listed in subparagraph (a) above shall be permitted to attend all meetings;

(c) ATA or the other sponsoring persons or organizations shall file in the dockets of these proceedings within seven days a written report of each meeting held including any drafts or preliminary drafts prepared, and any proposed agreements;

(d) Any agreement reached shall be submitted to DOT for approval before it can be implemented;

(e) Attendees at such meetings may not discuss rates, fares or capacity. Attendees may, however, discuss the insurance cost implications to carriers, or the insurability, of proposals to revise the liability system;

*provided that* conditions (a)-(c) shall not apply to discussions between carriers party to the IIA, the MIA, or the IPA and one or more other carriers to encourage carriers to become party to those agreements, or to coordinate their implementation ;

10. Except to the extent specifically granted herein, we defer for later consideration and action all other requests in the Applications of the International Air Transport Association and the Air Transport Association of America, in these proceedings, and the conditions proposed in Order to Show Cause 96-10-7 ;

11. We grant the motion of IATA to extend the time for filing a Petition for reconsideration of Order 96-11-6 and accept the late-filed answer IATA's Petition filed by the Victims Families' Associations;

12. This order may be amended, revoked or further conditioned, at any time, without a hearing, as the Department may find to be consistent with the public interest ; and

13. We will serve this order on all parties to this proceeding and the Secretary of State, the Attorney General and the Federal Aviation Administration.

By:

PATRICK V. MURPHY
Deputy As sistant Secretary for
Aviation and International Affairs

(SEAL)